(1) Supreme Court, U.S.
FILED

991407 FEB 2 2 2000

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

FRANK'S CASING CREW & RENTAL TOOLS, INC.,

Petitioner,

-versus-

MARINE DRILLING MANAGEMENT CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JENNIFER E. BEYER
Counsel of Record
PREIS, KRAFT & ROY
102 Versailles Boulevard, Suite 400
P. O. Box 94-C
Lafayette, Louisiana 70509
318-237-6062
Attorney for Petitioner

Curry & Taylor 202-393-4141/Washington D.C. 20005

60PP

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit violated the intent behind and the policies underlying 33 U.S.C. 905(b), rendering Congress' attempt, through §905(b), to overrule *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed 133 (1956)* null, by once again requiring an LHWCA employer to bear the full burden of the liability of the vessel owner in addition to its own liability for LHWCA benefits?.

LIST OF PARTIES

Petitioner is FRANK'S CASING CREW & RENTAL TOOLS, INC., a Louisiana corporation. Named parties in the case below were MARINE DRILLING MANAGEMENT COMPANY, a Delaware corporation; the LOUISIANA WORKER'S COMPENSATION CORPORATION, a Louisiana corporation; and Murphy LeBlanc, a citizen of the State of Louisiana.

Although not made a party below, SHELL OFFSHORE, INC., a Delaware corporation, accepted the defense and indemnity of MARINE DRILLING MANAGEMENT COMPANY based on a contract between those two companies. As a result, SHELL OFFSHORE, INC. paid settlement funds to Murphy LeBlanc and pursued MARINE's rights against FRANK'S herein. SHELL, therefore, has an interest in this litigation as it is really SHELL who is seeking reimbursement of funds they paid on behalf of MARINE.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Relevant Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved 1

Statement of the Case 1

Reasons for Granting the Writ 6

I. The United States Court of Appeals for the Fifth Circuit violated the intent behind and the policies underlying 33 U.S.C. 905(b) and rendered Congress' attempt, through §905(b), to overrule *Ryan* null, by once again requiring an LHWCA employer to bear both the full burden of the liability of the vessel owner in addition to its own liability for LHWCA benefits, thereby resurrecting *Ryan* at the expense of LHWCA employers. 8

A.The intent behind and the policies underlying th enactment of 33 U.S.C. 905(b) 8

B.The intent behind and the policies underlying the enactment of 33 U.S.C. 905(b) have been abrogated by the courts, most significantly by the Fifth Circuit in the present case. 13

1.The *Voisin* Exception 13

2. The Present Case 17

Conclusion 28

Appendix

Decision of the Circuit Court 1a

Decision of the District Court Magistrate 9a

Decision of the District Court 12a

Order Denying Rehearing 13a

TABLE OF AUTHORITIES

CASES: PAGE

Addison v. Bulk Food Carriers, Inc., 489 F.2d 1041, 1042 (1st Cir. 1973). 13

Amoco Production Co. Cog-EPCO 1992 L.P. v. Lexington Ins. Co., 745 Si, 2d 676 (La. App. 1--st Cir. 9/24/99). 25

Bell v. Globe Lumber Co., 31 So. 994, 997 (La. 1902). 10

Bunge Edible Oil Corp. v. M/V Torm Rask, 756 F.Supp. 261, 267 (E.D. La. 1991), aff'd, 949 F.2d 786 (5th Cir. 1992), writ denied, 505 U.S. 1207, 112 S.Ct. 2998, 120 L.Ed.2d 875 (1992); 21

Campbell v. Sonat Offshore Drilling, Inc., 27 F.3d 185, 187-188 (5th Cir. 1994). 27

Coker v. Best Workover, Inc., 1993 U.S. Dist. LEXIS 10668 (E.D. La. 1993). 16

Connelly v. Southern Pac. Co., 72 So. 829, 833 (La. 1915). 10

Cooper Stevedoring Co. v. --Fritze Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974). 9

Corbitt v. Diamond M Drilling Co., 654 F.2d 329, 333 (5th Cir. 1981). 26, 27

Crawford v. Falcon Drilling Co., 131 F.3d 1120, 1124 (5th Cir. 1997), aff'd without opinion, 180 F.3d 261 (1999). 7

David Graves George v. Victor Talking Machine Co., 293 U.S. 377, 55 S.Ct. 229, 79 L.Ed 649 (1933). 7

Diamond Offshore Co. v. A&B Builders, Inc., 75 F. Supp. 2d 676 (S.D. -Tx. 1999). 16

Edmonds v. Compagnie General Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521, 528 (1979); 9

Falcon Operators, Inc. v. P.M.P. Wireline Services, Inc., 1997 U.S. Dist. LEXIS 17841 (E.D. 1997). 16

Foreman v. Exxon Corp., 770 F.2d 490, 496-97 (5th Cir. 1985). 26

Foster v. Subsea Int'l, Inc., 1998 U.S. Dist. LEXIS 11725 (E.D. La. 1998). 16

Foulk v. Donjon Marine Co., Inc., 963 F.Supp 427 (D.N.J. 1997), rev'd, 1998 MC 2926. 16

Harper v. Virginia Dept. Of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74, 86 7

Helaire v. Mobil Oil Co., 709 F.2d 1031, 1041 (5th Cir. 1983) 2

Hobbs v. Teledyne Movible Offshore, Inc., 632 F.2d 1238 (5th Cir. 1980), aff'd without opinion, 636 F.2d 314, 315 (5th Cir. 1981). 27

Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996), aff'd, 115 F.3d 358 (1997). 25

Houston v. U.S. Gypsum Co., 580 F.2d 815, 817 (5th Cir. 1978), aff'd 652 F.2d 467 (5th Cir. 1981); 22

In Re U. S. Abatement Corp., 79 F.3d 393, 400 (5th Cir. 1996); 19

Intercontinental Engineering-Manufacturing Corp. v. C. F. Bean Corp., 647 F.2d 621, 628-629 (5th Cir. 1981); 21

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), rh'g denied, 513 U.S. 1185, 115 S.Ct. 1179, 130 L.Ed.2d 1131 (1995), ... 7, 8

Johnson v. Amoco Production Co., 5 F.3d 949, 953 (5th Cir. 1993). 19

Lambert v. Maryland Cas. Co., 418 So.2d 553, 559 (La. 1982). 21

Lirette v. Popich Bros. Water Transport, Inc., 699 F.2d 725 (5th Cir. 1983). 28

Lumar Marine, Inc. v. Ins. Co. of North America, 910 F.2d 1267, 1273 (5th Cir. 1990). 19, 24

Mann v. Lynaugh, 840 F.2d 1194, 1197 (5th Cir. 1988). 6

Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); 25

Massie v. Inexco Oil Co., 798 F.2d 777, 779 (5th Cir. 1986); 21

Meacham v. Halley, 103 F.2d 967, 973 (5th Cir. 1939), U.S. cert. denied, 308 U.S. 572, 60 S.Ct. 86, 84 L.Ed 480 (1939); 22

Mills v. Director, OWCP, U.S. Dept. of Labor, 877 F.2d 356, 358-359 (5th Cir. 1989); 10

Munoz v. Flota Merchante Grancolombiana, S.A. 553 F.2d 837, 840 (2d -Cir. 1977). 12

Ogea v. Loffland Bros. Co., 622 F.2d 186, 189-190 (5th Cir. 1980). 23

O'Neal v. Chris Steak House, Inc., 525 So.2d 325, 328 (La. App. 1st Cir. 1988), writ not considered, 530 So.2d 556 (La. 1998). 21

Page v. Gulf Oil Corp., 7775 F.2d 1311, 1315 (5th Cir. 1985). 22

Pippen v. Shell Oil Co., 661 F.2d 378, 386 (5th Cir. 1981); 9

Price v. Louisiana Rural Rehabilitation Corp., 134 F.2d 548, 550 (5th Cir. 1943), U.S. cert. denied, 320 U.S. 758, 64 S.Ct. 65, 88 L.Ed 452 (1943); 22

Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422, 428 (9th Cir. 1980). 15, 16

Ramsey v. Georgia Pacific Corp., 597 F.2d 890, 894 (5th Cir. 1979), ... 22

Randall v. Chevron U.S.A., Inc., 13 F.3d 888,899 (5th Cir. 1994), modified on other grounds, 22 F.3d 568 (5th Cir.), cert. dismissed, 512 U.S. 1265, 115 S.Ct. 5, 129 L.Ed.2d 906, cert. denied, 513 U.S. 994, 115 S.Ct. 498, 130 L.Ed.2d 408 (1994). 2

Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352, 355, 89 S.Ct. 1835, 1837, 23 L.Ed.2d 360 (1969). 10

Ross v. White, 32 F.2d 750, 752 (6th Cir. 1929), cert. denied, 280 U.S. 584, 50 S.Ct. 35, 74 L.Ed. 633 (1929). 7

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 --S.Ct. 232, 100 L.Ed 133 (1956). ..... i, 10, 15

-Sandefer Oil & Gas, Inc. v. Duhon, 961 F.2d 1207, 1210 (5th Cir. 1992); 21

Scindia Steam Navigation Co. v. Delos SANTOS, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); 9

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed 1099 (1946). 9, 10

Smith v. Tenneco Oil Co., 803 F.2d 1386, 1388 (5th Cir. 1986). 24

Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). 9

The Standella, 108 F.2d 619, 620 (5th Cir. 1939). 22

U.S. v. Marine Shale Processors, 81 F.3d 1329, 1348 (5th Cir. 1996). 20

U.S. v. Robinson, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259, 262 (1960); 6

United States v. Adams, 106 F.3d 646, 647 (5th Cir. 1997), dismissed without opinion, 116 F.3d 1477 (1997); 6

Voisin v. ODECO Drilling Co., 744 F.2d 1174 (5th Cir. 1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1057, 84 L.Ed.2d 820 (1985). ..... passim

Waddell v. Chicago, 206 F.2d 748, 752 (7th Cir. 1953). 7

Warren County Port Commission v. Farrell Const. Co., 395 F.2d 901, 904 (5th Cir. 1968); 22

Washington Nat'l Ins. Co. v. Brown, 94-1346 (La. App. 1st Cir. 4/7/95); 654 So.2d 724, 728, n. 4, writ denied, 661 So.2d 497 (La. 1995); 21

Woods v. Dravo Basic Materials Co., Inc., 887 F.2d 618, 621 (5th Cir. 1989); 19

Zapata Offshore Co., 784 F.2d 628, 630 (5th Cir.), U.S. cert. denied, 479 U.S. 872, 107 S.Ct. 247, 93 L.Ed.2d 171 (1986); 22

Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 721 (2d Cir. 1978); 9

LEGISLATIVE MATERIAL:

H.R. Rep. No. 1441, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. and Ad. News 4698, 4704. 12

H.R. Rep. No. 1441, 92d Cong.2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4702-5. 9

STATUTES:

28 U.S.C. 227 7

28 U.S.C. §1254(1). 1

28 U.S.C. §1291 1

28 U.S.C. §1333 1

28 U.S.C. 1292(a) 7

28 U.S.C. 1292(a)(3) 7

28 U.S.C. 2107 7

33 U.S.C. §901 *et seq.* 1

33 U.S.C. 902(21) 2

33 U.S.C. 905(b) ..... passim

43 U.S.C. §1331 *et seq* 1, 10

46 U.S.C. 688, *et seq.* (1920). 9

R.S. 9:2780 25

LSA-R.S. 23:1021, *et seq* 9

OTHER AUTHORITIES:

Cusimano, Contractual Indemnity under Maritime and Louisiana Law, 43 La. Law Rev. 189, 205-206 (1982). 15

Wright Miller & Cooper, Federal Practice and Procedure §4004.1, p. 29 (1996). 26

OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals, Fifth Circuit is reported at 193 F.3d 873 (5th Cir. 1999).[1]

The decision of the United States District Court for the Western District of Louisiana in *LeBlanc v. Global Marine Drilling Co.*, Civil Action No. 95-2042, is not reported.[2]

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on October 22,1999. The Fifth Circuit denied rehearing and rehearing en banc in an order dated November 24, 1999. No motions for extension of time have been filed.

Because this petition is filed within ninety days of the U.S. Fifth Circuit Court of Appeal's denial of rehearing, this Honorable Court has jurisdiction of this petition by virtue of 28 U.S.C. §1254(1). Jurisdiction in the courts below was premised on federal admiralty jurisdiction, 28 U.S.C. §1333, and federal appellate jurisdiction of the district courts of the United States, 28 U.S.C. §1291.

APPLICABLE LAWS INVOLVED

This case is governed by federal general maritime law, as modified and abrogated by the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.* and the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*

STATEMENT OF THE CASE

On November 15, 1995, Murphy LeBlanc, an employee of FRANK'S CASING CREW & RENTAL TOOLS, INC. ("FRANK'S"), filed suit against MARINE DRILLING MANAGEMENT COMPANY ("MARINE") for damages arising from an accident which occurred on August 14, 1995 while he

---

[1] App. 1a.

[2] App. 8a.

was working as a caser on a jack-up rig, the Marine 200, owned by MARINE and located in the Gulf of Mexico.[3] The jack-up rig was provided by MARINE pursuant to a Master Drilling Agreement between its predecessor, Keyes Offshore Limited, III and the Operator, SHELL OFFSHORE, INC. ("SHELL").[4] The casing services were provided pursuant to a contract between FRANK'S and SHELL.[5] There also existed between MARINE and FRANK'S a Master Service Agreement ("MSA") dated May 7, 1993,[6] which contract is at issue.

In response to the claims made against it by Mr. LeBlanc, MARINE made demand upon SHELL for contractual defense and indemnity pursuant to the Master Drilling Agreement.[7] SHELL assumed MARINE'S defense and indemnity. On October 17, 1996, under the guise of MARINE,[8] SHELL filed a Third Party Complaint against FRANK'S seeking contractual defense and indemnity pursuant to the MSA between MARINE and FRANK'S.[9] MARINE also sought additional assured status on policies issued to FRANK'S by its underwriters for all claims made against MARINE by Mr. LeBlanc.[10] FRANK'S

[3] Record Pages 48 and 276.

[4] Record Page 276. As the charterer of the MARINE 200, SHELL is deemed a vessel for purposes of §905(b). See, definition of "vessel" at 33 U.S.C. 902(21) which includes the vessel's owner *pro hac vice, Helaire v. Mobil Oil Co., 709 F.2d 1031, 1041 (5th Cir. 1983)* and *Randall v. Chevron U.S.A., Inc., 13 F.3d 888,899 (5th Cir. 1994), modified on other grounds, 22 F.3d 568 (5th Cir.), cert. dismissed, 512 U.S. 1265, 115 S.Ct. 5, 129 L.Ed.2d 906, cert. denied, 513 U.S. 994, 115 S.Ct. 498, 130 L.Ed.2d 408 (1994).*

[5] Record Page 276.

[6] Record Page 276.

[7] Record Page 277.

[8] Despite the filing of these claims under the name of MARINE, it should not be overlooked that it is in reality SHELL who is seeking reimbursement of its own contractual obligations to MARINE. If should further be noted that --SHELL's own contract with FRANK'S would not provide SHELL with any such relief.

[9] Record Pages 174-176. As discussed below, MARINE and thus SHELL later conceded the invalidity of the defense and indemnity provision under 33 U.S.C. 905(b), leaving only the issue of the validity of the additional assured obligation to be decided. Record Page 393; App. 8a.

[10] Record Page 176.

underwriters have not been made parties to this litigation. Neither the extent of coverage set forth in the contract nor the actual coverage afforded by FRANK'S has yet been determined.

On August 18, 1997, FRANK'S moved for summary judgment on MARINE'S Third Party Complaint.[11] MARINE opposed FRANK'S Motion for Summary Judgment, relying solely on the Fifth Circuit's decision in *Voisin*,[12] claiming that the MSA unambiguously required that MARINE be named as an additional assured and that the additional assured requirement stood independently from the indemnity clause.[13] On September 22, 1997, the district court granted FRANK'S motion, dismissing all claims of MARINE against FRANK'S.[14]

The district court correctly found the MSA was not applicable and dismissed MARINE's claims.[15] The MSA also clearly reveals that both parties anticipated MARINE giving consideration in order for any obligations assumed by FRANK'S in the contract to be effective.[16] Paragraph 3.1 provides that the "Contractor [MARINE] shall pay Subcontractor [FRANK'S] for the work and/or equipment or materials furnished by Subcontractor at the rate stipulated in the work orders . . . . "[17] Likewise, it is clear from Paragraphs 7.1, 7.4, 9.4 and 10.1 that the obligations of the parties would only pertain to work "**arising out of the performance of this Contract**" or to "**work performed pursuant hereto.**"[18]

In the case at hand, Mr. LeBlanc, as an employee of FRANK'S, was providing casing services to SHELL, which

---

[11] Record Pages 260-320.

[12] *Voisin v. ODECO Drilling Co., 744 F.2d 1174 (5th Cir. 1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1757, 84 L.Ed.2d 820 (1985).*

[13] Record Pages 337-342.

[14] Record Pages 393-396; App. 8a-11a.

[15] Record Page 395; App. 10a-11a.

[16] See, §9.4 regarding Taxes and Claims and §14.0 regarding Termination of Work. Record Pages 286-288.

[17] Record Page 281.

[18] Record Pages 284, 285 and 287. Emphasis added.

required that this work be performed aboard a MARINE vessel, chartered by SHELL. FRANK'S was not working for MARINE at the time of the accident and MARINE paid FRANK'S nothing for this work [19] From the contract's inception in May of 1993 through Mr. LeBlanc's accident, there was no consideration paid MARINE in exchange for FRANK'S alleged obligation to provide them with insurance coverage as an additional assured.

The work performed by Mr. LeBlanc at the time of his alleged accident was not being done pursuant to the MSA between FRANK'S and MARINE and therefore did not arise out of the performance of that contract.[20] As such, FRANK'S had no contractual duty to name MARINE as an additional assured under its policies for the claims of Mr. LeBlanc against MARINE. As was correctly pointed out by the district court, Paragraph 7.1 takes into account a situation where FRANK'S would be performing work for MARINE.[21] However, the facts clearly show this is not the case. MARINE has never hired FRANK'S for anything. Both MARINE and FRANK'S were at the time in the position of being direct contractors of SHELL. Therefore, the MSA is not applicable, and the district court's opinion should be reinstated.

For the following reasons, it is FRANK'S position that even should the contract be held applicable, which is at all times denied, the contract did not require FRANK'S to provide additional assured coverage to MARINE in the case at hand. The insurance provisions of the MSA, although requiring FRANK'S to obtain certain coverages, are specifically tied to the indemnity obligations assumed by FRANK'S. Paragraph 6.3 provides, in pertinent part:

> . . . Additionally, **to the extent Subcontractor [FRANK'S] assumes liability hereunder, and**

---

[19] Record Page 276. Nor has MARINE ever retained the services of FRANK'S.
[20] Record Page 395; App. 10a.
[21] Record Pages 394-395; App. 10a-11a.

> **agrees to indemnify Contractor [MARINE], Contractor shall be named an additional insured in all such insurance policies** (with the exception of Workers' Compensation coverage) with all such insurance being primary to any insurance of Contractor that may apply to an occurrence, accident or claim. . . .[22]

According to the contract language, MARINE was to be named additional assured under FRANK'S comprehensive general liability policy only "to the extent Subcontractor [FRANK'S] assumes liability hereunder, and agrees to indemnify Contractor [MARINE]. . . ." The policy language tracks this, providing for additional assured status only when and to the extent the parties have agreed to such in writing.23 The existence/validity of the additional assured endorsement is thereby conditioned upon the defense and indemnity obligation. Since the defense and indemnity provision is legally null under §905(b) of the LHWCA, as conceded by MARINE,[24] the dependent additional assured provision is also null.[25] FRANK'S cannot be deemed to have either assumed or agreed to undertake a legally null indemnity obligation and thereby was not required by the contract to name MARINE additional assured.

MARINE appealed the district court's ruling, again relying solely on *Voisin*.[26] The Fifth Circuit vacated the district

---

[22] Record Page 283. Emphasis added.

[23] Record Page 313.

[24] Record Page 393; App. 8a.

[25] Record Pages 262-274.

[26] Mr. LeBlanc and MARINE (funded by SHELL) entered into a Receipt and Release in December of 1997. Pursuant to the terms of the settlement agreement, Mr. LeBlanc received the sum of $507,300 in exchange for the release of MARINE from liability to the Plaintiffs. SHELL as MARINE now seeks recovery of this and of attorney's fees herein. No documentation has been provided concerning the attorney's fees incurred. FRANK'S does note, however, that under no circumstances would any attorney's fees incurred in pursuit of defense, indemnity and/or insurance coverage be recoverable. *Ogea v. Loffland Bros. Co., 622 F.2d 186, 190-192 (5th*

court's ruling and remanded the case for further proceedings on October 22, 1999.[27] The Fifth Circuit found the MSA applicable to the case at hand.[28] It found FRANK'S owed an obligation to list MARINE as an additional assured, which obligation was not contingent upon the legal enforceability of the indemnity provision.[29] It summarily found the present case to be similar to *Voisin*, without so much as discussing the requirement of the *Voisin* exception, and rejected FRANK'S argument that the additional assured obligation failed for lack of consideration.[30] FRANK'S petitioned for rehearing and rehearing en banc. Both petitions were denied on November 24, 1999.[31]

FRANK'S wishes to point out the Fifth Circuit's lack of jurisdiction when it decided this case below. 28 U.S.C. 1292(a)(3) provides the Court of Appeals shall have jurisdiction of appeals from "[i]nterlocutory decrees of such district courts . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."[32] The district court ruled on the Motions for Summary Judgment on September 22, 1997. Final judgment disposing of the remainder of the claims did not occur until January 27, 1998, and MARINE did not file its Notice of Appeal until February 12, 1998.

The law is clear that timeliness in noticing appeals is mandatory and jurisdictional and compliance with applicable requirements is of the utmost importance.[33] If an appeal is not

---

Cir. 1980).

[27] App. 1a.

[28] App. 2a-3a.

[29] App. 4a-5a.

[30] App. 5a-6a.

[31] App. 13a-14a.

[32] In the present case, Mr. LeBlanc designated his claim as one in admiralty, and the third party claims by MARINE against FRANK'S revolve around a maritime contract. See, respectively, Record Page 48 and Record Pages 267 and 336-343 by implication.

[33] *U.S. v. Robinson, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259, 262 (1960), United States v. Adams, 106 F.3d 646, 647 (5th Cir. 1997), dismissed without opinion, 116 F.3d 1477 (1997); Mann v. Lynaugh, 840 F.2d 1194, 1197 (5th Cir. 1988).*

timely noticed, the Court of Appeals must dismiss for want of jurisdiction.[34] Parties cannot confer jurisdiction upon the Court of Appeals and defects in jurisdiction cannot be waived.[35]

In *David Graves George v. Victor Talking Machine Co.*,[36] petitioner sought writ of certiorari of a Third Circuit decree reversing an interlocutory decree of the district court in a suit brought for infringement of copyright. The district court entered a decree on March 31, 1933, granting an injunction and appointing a special master to take and state an account of profits and to report to the court. Appeal was not taken until May 18, 1933.37 This Honorable Court found that as the appeal was not taken within the time prescribed by law,[38] the appellate court was without jurisdiction when it made its decision. Thus, the decree of the Court of Appeals was reversed.

The September 22, 1997 ruling was an interlocutory decree under 28 U.S.C. 1292(a)(3) as it did not dispose of all claims. According to the Fifth Circuit case of *Hamilton v. Williams*,[39] when there is an order disposing of some but not all of

---

[34] *Waddell v. Chicago, 206 F.2d 748, 752 (7th Cir. 1953).*

[35] *Ross v. White, 32 F.2d 750, 752 (6th Cir. 1929), cert. denied, 280 U.S. 584, 50 S.Ct. 35, 74 L.Ed. 633 (1929).*

[36] *David Graves George v. Victor Talking Machine Co., 293 U.S. 377, 55 S.Ct. 229, 79 L.Ed 649 (1933).*

[37] Final judgment was entered September 15, 1938.

[38] *Id. at 439.* 28 U.S.C. 227 was the relevant rule at the time providing an appeal of an injunction must be within thirty days of the order. 28 U.S.C. 227 has now been incorporated, in part, in both 28 U.S.C. 1292(a) and 28 U.S.C. 2107.

[39] *Hamilton Plaintiffs v. Williams Plaintiffs, 147 F.3d 367, 370-371 (5th -Cir. 1998).* The Fifth Circuit has adopted as its own the U.S. Supreme Court's rules on retroactivity of legal principles announced in civil cases. *Crawford v. Falcon Drilling Co., 131 F.3d 1120, 1124 (5th Cir. 1997), aff'd without opinion, 180 F.3d 261 (1999).* The Supreme Court announced in *James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), rh'g denied, 513 U.S. 1185, 115 S.Ct. 1179, 130 L.Ed.2d 1131 (1995),* that a federal law, once announced and applied to the parties to the controversy, "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate . . . . announcement of the rule." *Harper v. Virginia Dept. Of Taxation, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74, 86, explaining Beam.* The Fifth Circuit in *Hamilton* applied its rule of

the claims at issue, appellants must file their Notice of Appeal within thirty days of that order, rather than waiting until final judgment is entered. The appellants cannot revive the appeal of the earlier order by appealing the final judgment. In that case, the Fifth Circuit found jurisdiction lacking and dismissed the appeal. In the present case, MARINE should have filed its Notice of Appeal within thirty days of the September 22, 1997 ruling. Since it failed to do so, the Fifth Circuit was lacking in jurisdiction at the time it entered its decision, and, under *George v. Victor*, its opinion should be reversed.

ARGUMENT

I. The United States Court of Appeals for the Fifth Circuit violated the intent behind and the policies underlying 33 U.S.C. 905(b) and rendered Congress' attempt, through §905(b), to overrule *Ryan*[40] null, by once again requiring an LHWCA employer to bear both the full burden of the liability of the vessel owner in addition to its own liability for LHWCA benefits, thereby resurrecting *Ryan* at the expense of LHWCA employers.

A. The intent behind and the policies underlying the enactment of 33 U.S.C. 905(b)

33 U.S.C. 905(b) was enacted to eliminate the double exposure of longshore employers which had been created under

---

law to the parties in the case. Therefore, under *Beam*, the *Hamilton* rule applies in the present case even though certain events predated the Fifth Circuit's announcement of the rule. The fact that parties may have relied upon the old rule and the fact that they might suffer from retroactive application of the new is of no consequence. *Beam*, 115 L.Ed.2d at 493. It is the nature of precedent. This is particularly pertinent in the present case where the statute at issue is not new but is simply being interpreted in a different manner.

[40] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed 133 (1956).*

Ryan.[41] Prior to the enactment of §905(b), such an employer was liable for both worker's compensation benefits under the LHWCA[42] and indirect tort liability for the vessel's liability through *Ryan*, which provided a vessel owner with a remedy against the longshoreman's employer for recovery in the form of indemnity. The enactment of §905(b) was intended to eliminate the employer's double burden by voiding any direct or indirect indemnity agreements between employers and vessels, thereby rendering LHWCA employers liable only for compensation benefits to their employees.[43] A brief historical review clearly establishes the foregoing.

In the early 1900's, state worker's compensation acts were adopted providing compensation remedies for land-based workers.[44] In 1920 Congress enacted the Jones Act,[45] which provided a negligence remedy for seamen against their employers. Around the same time, the United States Supreme Court ruled that non-seaman workers who were injured or died on navigable waters could not qualify for state worker's compensation benefits.[46] As this relegated them to common law

---

[41] *Edmonds v. Compagnie General Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521, 528 (1979); H.R. Rep. No. 1441, 92d Cong.2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4702-5*; *Scindia Steam Navigation Co. v. Delos SANTOS, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); Pippen v. Shell Oil Co., 661 F.2d 378, 386 (5th Cir 1981); Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 721 (2d Cir. 1978)*; and *Cooper Stevedoring Co. v. Fritze Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974).*

[42] Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §901, *et seq.*

[43] Congress enacted §905(b) "to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman -- in other words, to overrule [*Seas Shipping Co. v.*] *Sieracki* [, *328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946)*] and *Ryan*." *Edmonds v. Compagnie General Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521, 528 (1979); H.R. Rep. No. 1441, 92d Cong.2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4702-5.*

[44] For example, Louisiana Worker's Compensation Act, LSA-R.S. 23:1021, *et seq.*, was enacted in 1914.

[45] 46 U.S.C. 688, *et seq.* (1920).

[46] *Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S Ct. 524, 61 L.Ed. 1086 (1917).*

claims against their employers, which were usually barred by the then-valid contributory negligence bar[47] and fellow servant rules,[48] they were left with essentially no remedy.

Congress addressed this problem in 1927 by creating the LHWCA, a comprehensive worker's compensation scheme for maritime workers who did not qualify as Jones Act seamen. This proved adequate until the 1950's, when a new class of workers developed, those working on platforms on the Outer Continental Shelf. Once again a gap surfaced, as those platform workers were not entitled to seaman status, benefits under the LHWCA or state worker's compensation. In an effort to close the gap, Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. §1331, *et seq.*[49]

Two other causes of action developed around the same time: 1) the right of a longshoreman to sue the vessel upon which he was working,[50] and 2) the right of a vessel to indemnity against the employer of a longshoreman.[51] As a result, longshoremen could sue the vessel upon which they worked for unseaworthiness and thereafter the vessel owner could recover the damages paid from the longshoreman's employer. This "*Ryan* doctrine" resulted in a longshoreman's employer paying both the tort damages owed by the vessel and the compensation benefits it owed under the LHWCA. The LHWCA was amended in 1972 to eliminate the employer's double burden by limiting the action provided to longshoremen against vessels to one in negligence, the §905(b) action, and by voiding any indemnity agreements between employers and vessels. It now reads in pertinent part:

---

[47] See, for example, *Connelly v. Southern Pac. Co., 72 So. 829, 833 (La. 1915).*

[48] See, for example, *Bell v. Globe Lumber Co., 31 So. 994, 997 (La. 1902).*

[49] *Mills v. Director, OWCP, U.S. Dept. of Labor, 877 F.2d 356, 358-359 (5th Cir. 1989); Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352, 355, 89 S.Ct. 1835, 1837, 23 L.Ed.2d 360 (1969).*

[50] *Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed 1099 (1946).*

[51] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 --S.Ct. 232, 100 L.Ed 133 (1956).*

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this Act, and the **employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void** . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.[52]

By virtue of the amendment, a longshore employer "shall not be liable to the vessel for such damages **directly or indirectly** and any agreements . . . to the contrary shall be void."[53] The language of the amendment is absolute. It does not distinguish between liability in the form of indemnity versus insurance. Neither does the legislative history, which provides in pertinent part:

> Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.

---

[52] Emphasis added.

[53] Emphasis added.

> Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, **vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries**.
>
> Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. **It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort**.[54]

It is clear that Congress was cognizant of the coercive effects of the unequal bargaining power of the vessel and its superior economic strength which could be used to circumvent and nullify the exclusive liability of an employer under the Act by requiring indemnification from a covered employer.[55] This concern drove Congress to prohibit recovery "under **any theory**, including, without limitation, theories **based on contract** or tort"[56] that would circumvent the employer's exclusive liability under the Act.[57] Given this all encompassing language, one has difficulty ascertaining how any exceptions could be created. Indeed, is not a contract of insurance still a contract? What is

---

[54] H.R. Rep. No. 1441, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. and Ad. News 4698, 4704. Emphasis added.

[55] *Munoz v. Flota Merchante Grancolombiana, S.A. 553 F.2d 837, 840 (2d -Cir. 1977).*

[56] Emphasis added.

[57] The reality today is that an LHWCA employer's CGL policy would cover both its defense and indemnity obligation and its additional assured obligation, should they be owed. There is thereby no justifiable reason to distinguish between the two obligations as in both scenarios the same CGL policy would be invoked.

more, isn't the contractual obligation to name another additional assured also based on a contract?

By virtue of these amendments, LHWCA employers were once again to be only liable for compensation benefits to their employees and were not to be responsible for picking up the vessel's liability as well. The purpose behind Congress' enactment of §905(b) was thus to eliminate the employer's double burden in the form of worker's compensation benefits and liability for the vessel owner's negligence. In turn, the vessel owner no longer faced liability for unseaworthy conditions but rather was only answerable for injuries resulting from its own negligence.[58]

B. The intent behind and the policies underlying the enactment of 33 U.S.C. 905(b) have been abrogated by the courts, most significantly by the Fifth Circuit in the present case.

1. **The *Voisin* Exception**

The Fifth Circuit fashioned an extremely limited exception to this double liability prohibition in *Voisin*.[59] In *Voisin*, an employee of Rig Hammers, Inc., was injured while working aboard a drilling vessel which was owned and operated by Odeco Drilling, Inc. At the time of his injury, Voisin was acting as a supervisor of a Rig Hammers' well casing crew aboard the vessel, driving conductor pipe in preparation for drilling operations. Shell had retained the casing services of Rig Hammers and separately contracted for Odeco to provide the vessel and drilling services. The employee sued Odeco, who filed a third-party action against Rig Hammers, alleging Rig Hammers' breach of the Master Service Contract ("MSC") between Odeco

---

[58] *Addison v. Bulk Food Carriers, Inc., 489 F.2d 1041, 1042 (1st Cir. 1973).*

[59] *Voisin v. ODECO Drilling Co., 744 F.2a 1174 (5th Cir. 1984), cert. denied, 470 U.S. 1053, 105 S.Ct. 1057, 84 L.Ed.2d 820 (1985).*

and Rig Hammers for its failure to provide it with defense, indemnity and/or additional assured status.[60]

With the indemnity provision invalid under §905(b),[61] attention turned to the insurance provisions. The contract contained a broadly worded indemnity clause operating in favor of Odeco. It also required Rig Hammers to carry various kinds of insurance with stated minimum limits. The additional assured provisions of the contract provided in relevant part that:

> [A]ll policies of [Rig Hammers] . . . shall name [Odeco] as an additional assured and shall be endorsed to waive Subrogation against [Odeco] and against all parties for whom [Odeco] may be working, with the exception of Workman's Compensation insurance but including all insurance carried by [Rig Hammers] protecting against loss of or damages to its property and equipment employed in the performance of any work order issued hereunder.[62]

Rig Hammers had an endorsement added to its comprehensive general liability policy which provided that the insurer "assume[ed] no greater liability . . . than would have been assumed by insuring the indemnity clause contained in the contract between Rig Hammers and [Odeco]. . . ."[63]

---

[60] *Voisin, 744 F.2d at 1175.*

[61] *Voisin, 744 F.2d at 1176.*

[62] *Voisin, 744 F.2d at 1175.* It is critical to note the difference between this unrestricted insurance requirement and that found in the MARINE/FRANK'S contract. Compare the contract language in *Voisin*, "all policies of [Rig Hammers] . . . shall name [Odeco] as an additional assured," with the qualified contract language at issue in the present case, "to the extent subcontractor [FRANK'S] assumes liability hereunder, and agrees to indemnify Contractor [MARINE], Contractor shall be named as additional insured."

[63] *Voisin, 744 F.2d at 1176.*

The Fifth Circuit found the additional assured clause was not prohibited under §905(b) as a proscribed form of indirect liability, relying upon *Price*.[64] In *Price*, the Ninth Circuit held that §905(b) did not prohibit a coinsured provision of a contract between a vessel and a stevedoring company. The Court explained that "Congress' purpose in prohibiting both direct and indirect liability of stevedores to vessels was to foreclose all theories under which *Ryan* triangle suits might be brought rather than to prevent insurance arrangements."[65] The Court reasoned that the parties could allocate the economic burden of premiums as they wished.[66]

The *Price* decision ignores the problem of unequal bargaining power between the vessel and the stevedore who realistically has no opportunity to reject the economic burden of the insurance premium if it desires to work aboard the vessel, albeit for someone else.[67] The *Price* decision circumvented one of the major purposes of the 1972 amendments, which was to prevent the more powerful vessel owner from requiring the stevedore to assume indemnity for the vessel's negligence.[68] The Court failed to recognize that the contractor's burden of having the vessel named as an additional assured is functionally no different than the requirement that the contractor indemnify the vessel.[69] Furthermore, the *Price* court, and the *Voisin* court in following it, failed to recognize that at issue was an obligation to provide additional assured coverage in an insurance contract which was based on a contract. Contract-based forms of direct or indirect liability were expressly prescribed by §905(b).

Adopting the reasoning of *Price*, the Fifth Circuit found that Rig Hammers breached the MSC by failing to add Odeco as

---

[64] *Price v. Zim Israel Navigation Co., Ltd., 616 F.2d 422, 428 (9th Cir. 1980).*

[65] *Price, 616 F.2d at 428.*

[66] *Price, 616 F.2d at 429.*

[67] *Cusimano, Contractual Indemnity under Maritime and Louisiana Law, 43 La. Law Rev. 189, 205-206 (1982).*

[68] *Id.*

[69] *Id*

an additional assured in the unqualified manner directed by the MSC and cast Rig Hammers in judgment for damages relating to same. The Fifth Circuit reasoned that the legislative history of §905(b) did not indicate an intent to proscribe indirect liability in the form of the additional assured provision of the MSC.[70] In so holding, the Court rejected Rig Hammers' suggestion that the MSC was void for lack of consideration, finding that although Odeco had not hired Rig Hammers on this job, the parties had an ongoing business relationship which allowed Rig Hammers to pass the cost of obtaining the additional assured endorsement onto Odeco in the cost of Rig Hammers' billings on other jobs.[71] The Court further specifically found no evidence indicating the terms of the MSC were the product of oppressive or overreaching conduct on Odeco's part.[72] On these grounds, the Fifth Circuit established a very limited exception to the double burden prohibition of §905(b).[73]

Voisin has been adopted in a number of decisions including *Diamond Offshore*[74] *Foster*,[75] *Falcon Operators*,[76] *Foulk*[77] and *Coker*.[78] Pursuant to *Voisin*, §905(b) has been limited to prohibit indirect liability only in the form of indemnity agreements in contracts between vessels and longshore employers (whereas indirect liability in the form of a contractually required additional assured obligation has been held valid despite the

---

[70] *Voisin, 744 F.2d at 1177.*

[71] *Voisin, 744 F.2d at 1177, n.2.*

[72] *Voisin, 744 F.2d at 1178.*

[73] The *Voisin* exception differs from *Price v. Zim* as, in that case, the Court held the parties could allocate the economic burden of insurance premiums as they wished whereas in *Voisin* the Fifth Circuit required the longshore employer be able to pass the cost of the insurance premiums on the vessel.

[74] *Diamond Offshore Co. v. A&B Builders, Inc., 75 F. Supp. 2d 676 (S.D. -Tx. 1999).*

[75] *Foster v. Subsea Int'l, Inc., 1998 U.S. Dist. LEXIS 11725 (E.D. La. 1998).*

[76] *Falcon Operators, Inc. v. P.M.P. Wireline Services, Inc., 1997 U.S. Dist. LEXIS 17811 (E.D. 1997).*

[77] *Foulk v. Donjon Marine Co., Inc., 963 F.Supp 427 (D.N.J. 1997), rev'd, 1998 MC 2926.*

[78] *Coker v. Best Workover, Inc., 1993 U.S. Dist. LEXIS 10668 (E.D. La. 1993).*

reality that whether it is done through contractual indemnity or contractually required additional assured coverage, the effect is to place the liability burden of the vessel on the longshore employer), provided the cost of doing so is passed on to the vessel owner and there is no evidence of oppressive or overreaching conduct on the part of the vessel owner.

Voisin provided an extremely limited jurisprudential exception to the double liability prohibition of 33 U.S.C. 905(b), contrary to the policies underlying its enactment. Pretermiting whether the *Voisin* decision was correct in doing so, the extension of the *Voisin* exception in this case where 1) there was no consideration and no opportunity for the employer to pass the cost on to the vessel; and 2) SHELL chartered the MARINE 200, required FRANK'S to work aboard it and to gain passage MARINE forced FRANK'S to sign the MSA, is clearly inappropriate, abrogating Congressional intent.

2. The Present Case

The indemnity provisions of the contract between FRANK'S and MARINE are invalid under §905(b) of the LHWCA as conceded by MARINE below.[79] This issue is not before the Court. Instead, MARINE avers FRANK'S owes a contractual obligation under the MSA to name MARINE as an additional assured on the CGL and the P&I policies issued to FRANK'S which obligation is not barred by §905(b).[80] The additional assured provision in the MSA between MARINE and FRANK'S provides, at Paragraph 6.3, page 5 of the contract, in pertinent part:

---

[79] Record Page 393. Applying *Voisin* to the indemnity provisions in the present case yields the same result. *Voisin, 744 F.2d at 1176-77.*

[80] See, pp. 11-12, *supra*, for discussion regarding Congressional intent to exclude recovery based on a contract that attempts to circumvent the employer's exclusive liability under the LHWCA.

> . . . Additionally, **to the extent subcontractor [FRANK'S] assumes liability hereunder, and agrees to indemnify Contractor [MARINE]**, Contractor shall be named an additional insured in all such insurance policies (with the exception of Workers' Compensation coverage) with all such insurance being primary to any insurance of Contractor that may apply to an occurrence, accident or claim.[81]

In deciding this case below, the Fifth Circuit, relying almost entirely on its prior decision in *Voisin*, found that even though the indemnity obligation was invalid under §905(b), FRANK'S was nevertheless obligated to name MARINE as an additional assured, despite the qualifying language of the contract. In doing so, the Fifth Circuit violated the policies underlying the enactment of §905(b), by allowing the additional assured obligation to stand between a vessel and a longshore employer, **a form of indirect liability** based on contract, when the requirements for the limited exception carved out in *Voisin* do not here exist.

The contract language regarding additional assured coverage in *Voisin* is entirely distinguishable from the contract language at issue here. As pointed out by the Court in *Voisin*, the contract between Odeco and Rig Hammers provided for **unqualified** additional assured status to Odeco. The additional assured provision in the MSA between MARINE DRILLING and FRANK'S, in contrast, is expressly limited "**to the extent Subcontractor [FRANK'S] assumes liability hereunder, and agrees to indemnify Contractor [MARINE DRILLING]**."[82]

Under the clear language of the additional assured provision, MARINE was to be named an additional assured only to the extent FRANK'S assumed liability under the contract and

---

[81] Record Page 283. Emphasis added.

[82] Record Page 283. Emphasis added.

agreed to indemnify MARINE. This qualifying language did not appear in the contract in *Voisin* and its existence mandates a different result.[83] Indeed, as the *Voisin* decision was handed down in 1984, MARINE could certainly have used the very language used by Odeco in that decision in its own contract with FRANK'S, which was not signed until May 7, 1993,[84] and thereby MARINE could have ensured the same result. By using different language, tying the indemnity and additional assured obligations together, MARINE certainly could not have expected to obtain the same result as did Odeco in *Voisin* nor can the difference be ignored. Thus, the evaluation of this language requires independent consideration, rather than blanket application of *Voisin*. As contract language must be interpreted to give effect to all provisions,[85] it flies in the face of good reason to suggest that this limiting/qualifying language was added to the contract to serve no purpose. The only other reasonable alternative is to consider the language ambiguous in which case it is to be construed against MARINE, its drafter, with the same result.[86]

The *Voisin* Court recognized the ability of the parties to contractually tie indemnity and insurance obligations together, as evidenced by their finding that the contract language for procurement of insurance was unqualified - yet the insurance policy language was qualified - limited to the extent of the indemnity.[87] The absence of such a link in *Voisin* clearly did not

---

[83] As further evidence of this, Paragraph 6.1 explains that the indemnity obligations would not be affected by the insurance requirements. Record Page 282. The converse is not stated evidencing the intent that the insurance obligations would be limited by the indemnity obligations. Clearly, this reveals the intent of the parties that the indemnity obligations be primary and confirms that the insurance provisions are only valid to the extent the indemnity provisions are valid.

[84] Record Page 279.

[85] *Woods v. Dravo Basic Materials Co., Inc., 887 F.2d 618, 621 (5th Cir. 1989); Johnson v. Amoco Production Co., 5 F.3d 949, 953 (5th Cir. 1993).*

[86] *In Re U. S. Abatement Corp., 79 F.3d 393, 400 (5th Cir. 1996); Lumar Marine, Inc. v. Ins. Co. of North America, 910 F.2d 1267, 1273 (5th Cir. 1990).*

[87] *Voisin, supra at 1179.* The Court also held that "a **valid** additional assured clause

preclude all future contracting parties from tying them together and thereby ensuring that the insurance obligation would extend no further than the indemnity provision. Indeed, the *Voisin* decision itself first recognized the potential viability of an additional assured obligation even though the indemnity provision was invalid under the LHWCA. It thereby only became necessary for parties to tie the two together - to allow the enforceability of the obligations to be determined under one inquiry — after the decision in *Voisin*.

As parties are presumed to know the law, the use of this language in the insurance section of the contract, after the *Voisin* decision, clearly indicated to FRANK'S a desire by MARINE to get around the *Voisin* decision, a move with which it agreed and upon which it relied.[88] Under these circumstances it cannot be found that FRANK'S, armed with this knowledge, assumed any liability or agreed to indemnify MARINE in cases governed by §905(b). The insurance obligation must thereby fall. For these reasons as well, the present case is distinguishable from *Voisin*. In considering *Voisin*, where the indemnity agreement and the obligation to name as an additional assured were separate and distinct obligations, the additional assured provision was not affected by the prohibited defense and indemnity provisions when the two provisions were not linked together. Where, as here, the additional assured provision is clearly limited to and qualified by the defense and indemnity provision, which is invalid and unenforceable, *Voisin* is inapposite.[89]

---

is not prohibited under §905(b)." *Voisin, supra at 1177.* Emphasis added.

[88] *U.S. v. Marine Shale Processors, 81 F.3d 1329, 1348 (5th Cir. 1996).*

[89] Another way of looking at the relationship between the insurance and indemnity provisions of the MSA is to consider the insurance provisions to be subject to a suspensive condition, that being the validity and enforceability of the indemnity agreement. As the enforceability of the various obligations under the contract must be assessed each time circumstances arise which call the contract arguably into play, in each situation the validity and enforceability of the indemnity obligation must be determined as a condition precedent to evaluating the validity and enforceability of the insurance requirements. "An agreement which is subject to a suspensive condition is not binding until the condition is fulfilled." *Bunge Edible Oil Corp. v.*

The MSA restricted FRANK'S obligation to name MARINE additional assured to the extent FRANK'S "assume[d] liability . . . and agree[d] to indemnify" MARINE.[90] The Fifth Circuit found FRANK'S to have "agreed" to indemnify MARINE but did not specifically find that FRANK'S "assumed liability hereunder." While we do not believe FRANK'S did either, the Fifth Circuit failed to recognize the need to satisfy both prerequisites to the additional assured obligation.[91] FRANK'S should not be deemed by a Court to have assumed an obligation which it is presumed to know is legally void. FRANK'S and MARINE must be presumed to have known that in a situation where a longshoreman was injured and brought suit against the vessel, §905(b) would apply to nullify the indemnity claim of the vessel against the LHWCA employer. Likewise, there was and could have been no agreement to indemnify MARINE, because FRANK'S knew and is legally presumed to have known that the indemnity obligation was void. As did MARINE.[92] Similarly, FRANK'S cannot be deemed to have assumed a legally void obligation. By using language tying the insurance obligation to the indemnity obligation, in cases where the indemnity obligation is legally unenforceable, as here, the Fifth Circuit cannot impugn

---

M/V Torm Rask, 756 F.Supp. 261, 267 (E.D. La. 1991), aff'd, 949 F.2d 786 (5th Cir. 1992), writ denied, 505 U.S. 1207, 112 S.Ct. 2998, 120 L.Ed.2d 875 (1992); Intercontinental Engineering-Manufacturing Corp. v. C. F. Bean Corp., 647 F.2d 621, 628-629 (5th Cir. 1981); Washington Nat'l Ins. Co. v. Brown, 94-1346 (La. App. 1st Cir. 4/7/95); 654 So.2d 724, 728, n. 4, writ denied, 661 So.2d 497 (La. 1995); O'Neal v. Chris Steak House, Inc., 525 So.2d 325, 328 (La. App. 1st Cir. 1988), writ not considered, 530 So.2d 556 (La. 1998). If the condition precedent, the validity and enforceability of the indemnity agreement, does not materialize, the insurance obligations do not become effective.

[90] Record Page 283.

[91] Courts must determine the intent of the parties without rendering any part of the contract meaningless. Some effect is to be given to every word or clause if possible for a court may not impute to the parties the use of language without meaning or effect. *-Sandefer Oil & Gas, Inc. v. Duhon, 961 F.2d 1207, 1210 (5th Cir. 1992); Massie v. Inexco Oil Co., 798 F.2d 777, 779 (5th Cir. 1986); Lambert v. Maryland Cas. Co., 418 So.2d 553, 559 (La. 1982).*

[92] Record Page 393; App. 8a-9a.

unto FRANK'S an agreement to perform or an assumption of a legally unenforceable obligation. Indeed, it is error to do so.[93]

Since the additional assured obligation extends only to the extent of the indemnity assumed and agreed to by FRANK'S, and as FRANK'S and MARINE know, and are legally presumed to know, that the indemnity obligation is void, FRANK'S assumed and agreed to provide no indemnity and thereby no additional assured coverage to MARINE under the facts of this case. The Fifth Circuit ignored the express language of the insurance provisions of the MSA,[94] the effect of applicable law, §905(b), the law requiring construction of contracts against their drafter,[95] as well as the parties' presumed knowledge of applicable law,[96] in holding otherwise.

---

[93] To the extent the nullity of the indemnity and insurance obligations might cause any concern, it must not be forgotten that the MSA at issue was a general contract which MARINE required all service companies with whom it might work to enter. Indeed, MARINE is not alone in this practice. The use of general MSAs with all companies with whom one deals or may deal is commonplace in the maritime arena. These generic --MSAs are often followed up with specific work orders. *Matte v. Zapata Offshore Co., 784 F.2d 628, 630 (5th Cir.), U.S. cert. denied, 479 U.S. 872, 107 S.Ct. 247, 93 L.Ed.2d 171 (1986); Page v. Gulf Oil Corp., 7775 F.2d 1311, 1315 (5th Cir. 1985).*

[94] Unlike the language in this contract cited above, the additional assured provision in *Voisin* was without restriction, indicating simply that "all policies of [Rig Hammers] shall name --[Odeco] as an additional assured." *Voisin, 744 F.2d at 1175.*

[95] *Matter of U.S. Abatement Corp., supra; Lumar Marine, Inc., supra.*

[96] Parties are presumed to contract with knowledge of the law in effect at the time of the execution of the contract. See, *Ramsey v. Georgia Pacific Corp., 597 F.2d 890, 894 (5th Cir. 1979),* wherein the Fifth Circuit found that where the contract was written four years after the enactment of a statute making it illegal for an indemnitor to agree to indemnify indemnitee against indemnitee's own negligence, the parties to the contract were presumed to be aware of such statute and to have governed their conduct accordingly. *See also, Houston v. U.S. Gypsum Co., 580 F.2d 815, 817 (5th Cir. 1978), aff'd 652 F.2d 467 (5th Cir. 1981); Warren County Port Commission v. Farrell Const. Co., 395 F.2d 901, 904 (5th Cir. 1968); Price v. Louisiana Rural Rehabilitation Corp., 134 F.2d 548, 550 (5th Cir. 1943), U.S. cert. denied, 320 U.S. 758, 64 S.Ct. 65, 88 L.Ed 452 (1943); Meacham v. Halley, 103 F.2d 967, 973 (5th Cir. 1939), U.S. cert. denied, 308 U.S. 572, 60 S.Ct. 86, 84 L.Ed 480 (1939); The Standella, 108 F 2d 619, 620 (5th Cir. 1939).*

The Fifth Circuit also ignored the lack of consideration in the present case. In contrast to the record in this case, the record in *Voisin* established that Odeco and Rig Hammers had an ongoing business relationship, whereby Odeco hired Rig Hammers to perform work directly for them, on which occasions Rig Hammers paid Odeco. Based upon this evidence, the Fifth Circuit assumed the consideration received by Rig Hammers from the work performed on other jobs was sufficient to justify their undertaking the obligation of adding Odeco as additional assured on their policies of insurance, even though they were not working for Odeco at that particular time.

In the instant litigation, however, MARINE has never hired FRANK'S directly to do anything. Mr. LeBlanc, as an employee of FRANK'S, was providing casing services to SHELL, which required that this work be performed aboard a MARINE vessel. MARINE required that this contract be signed before allowing FRANK'S on its rig. The type of oppressive, overreaching conduct by a vessel in a superior bargaining position Congress sought to end clearly existed here. FRANK'S was not working for MARINE at the time of the accident, and MARINE paid FRANK'S nothing for this work.[97] There was no ongoing business relationship between them, and there was a complete lack of consideration by MARINE for FRANK'S providing them with insurance coverage as an additional insured, contrary to *Voisin* and thus warranting a different result in the present case.

Furthermore, if the MARINE/FRANK'S contract is read as MARINE desires, such that the insurance requirements are not limited to the extent of the validity and enforceability of the indemnity requirements, the contract is truly one-sided, with FRANK'S owing additional assured coverage to MARINE in every case. Whereas Paragraph 7.3 of the contract does reflect reciprocal indemnity obligations, as established by *Ogea*[98], in the event of conflicting insurance and indemnity provisions within

[97] Record Page 276

[98] *Ogea v. Loffland Bros. Co., 622 F.2d 186, 189-190 (5th Cir. 1980).*

the same contract, the insurance provisions prime. Here, Paragraph 6.1 with regard to insurance, requires only that FRANK'S obtain insurance naming MARINE as additional assured, without any reciprocal insurance provisions owed by MARINE to FRANK'S. As a result, FRANK'S would owe coverage to MARINE even when the indemnity provisions would require MARINE to indemnify FRANK'S. In other words, FRANK'S would owe MARINE insurance coverage anytime an employer of either company was injured while FRANK'S was present. Clearly, under MARINE's construction, endorsed by the Fifth Circuit, without hope of monetary consideration, FRANK'S would not even have the benefit of obtaining indemnity from MARINE should its employees be injured. On the other hand, if the contract is read as FRANK'S submits, such that the insurance provisions do not extend beyond the validity and enforceability of the indemnity provisions, *Ogea* would be distinguishable as by virtue of the clear contract language, the indemnity rather than the insurance provision would prime and FRANK'S would owe no insurance obligation where, as here, the indemnity provision is invalid.

The Fifth Circuit's suggestion that the word "valid" should have been included in Paragraph 6.3 to tie the insurance obligation to an enforceable indemnity obligation would require the inclusion of superfluous language. Indeed, when interpreting this contract while taking notice of the effect of applicable law, no such language is necessary. Furthermore, FRANK'S can only be held to have assumed or agreed to obligations clearly set forth in the contract. Contractual obligations are strictly construed.[99] As MARINE was the drafter of the MSA, any ambiguity or failure to clearly express its intent must be construed against MARINE and in favor of FRANK'S.[100] The Fifth Circuit applied the presumption in favor of the drafter, clearly an error.

---

[99] *Smith v. Tenneco Oil Co.*, 803 F.2d 1386, 1388 (5th Cir. 1986).

[100] *Matter of U.S. Abatement Corp., supra; Lumar Marine, Inc., supra.*

By extending *Voisin* to the present case, the Fifth Circuit stretched their jurisprudential exception well beyond any previously delineated scope, further violating the intent of Congress in enacting §905(b). As a result of this decision, a vessel can now force, through contract, a longshore employer to pay for the vessel's own negligence to the employer's employee by requiring the employer, with whom it has no ongoing business relationship and to whom it has never paid a penny, to buy at its own expense, additional assured coverage for that liability. Vessel owners are now doing what Congress attempted to eliminate when it enacted §905(b).

It should also be noted that the judicial gloss given to another contractual indemnity and insurance prohibiting statute forbids exactly the kind of end run around the statute as is attempted here. In Louisiana, the Louisiana Oilfield Indemnity Act ("LOIA"), R.S. 9:2780, provides that "any provision in any agreement arising out of the operations, services, or activities listed in Subsection G [including maritime agreements] . . . which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect." By finding that having the purported additional assured pay the cost of being named additional assured would not frustrate or circumvent the prohibitions of the statute, some courts have recognized a potential exception.[101] Section 905(b) has no such language but rather is absolute in its prohibition of all kinds of direct or indirect liability.

FRANK'S submits there is no room for any exception under §905(b). FRANK'S acknowledges the Court's practice of deferring issues until it can have the benefit of consideration by several lower courts or until cumulating events provide a better

---

[101] See, *Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994); Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996), aff'd, 115 F.3d 358 (1997).* But see, *Amoco Production Co. Cog-EPCO 1992 L.P. v. Lexington Ins. Co., 745 So. 2d 676 (La. App. 1st Cir. 9/24/99).*

perspective for decisions.[102] However, in light of the instant litigation, in which the Fifth Circuit extended *Voisin* (which has been itself on the books some fifteen years), it is clearly time for close scrutiny to be applied. As the decision below clearly frustrates the intent of the redactors of §905(b) to prevent longshore employers from having to shoulder the burden of tort liability in addition to its worker's compensation obligations, it should be overturned. FRANK'S respectfully submits that it is vital that the United States Supreme Court decide the issue of whether additional insurance is a form of indirect contract based liability which should be precluded under §905(b) and the policies underlying its enactment.

As a final note, the law is clear that a party's intention to extend the benefits of its contract to a third party, i.e., SHELL, must be specifically expressed. Where, as here, there is no mention of FRANK'S providing defense, indemnity or additional assured coverage to anyone for whom MARINE was working or with whom MARINE had a contract, the contract clearly does not meet this test.[103] A contract of indemnity should be construed to cover all losses, damages or liabilities which reasonably appear to have been within the contemplation of the parties but should not be read to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage.[104] The obligation to indemnify a party for contractual liability may arise only from the plainly expressed intention of the parties, spelled out in unambiguous terms.[105]

There is indeed a contract between SHELL and FRANK'S under which defense, indemnity and additional

---

[102] *16B Wright Miller & Cooper, Federal Practice and Procedure §4004.1, p. 29 (1996).*

[103] *Foreman v. Exxon Corp., 770 F.2d 490, 496-97 (5th Cir. 1985).*

[104] *Corbitt v. Diamond M Drilling Co., 654 F.2d 329, 333 (5th Cir. 1981).*

[105] *Foreman, 770 F.2d at 498.*

assured obligations were allocated between the parties. However, under that contract SHELL has no claim against FRANK'S. As a result, SHELL is hiding behind the identity of MARINE. Due to the *Corbitt* decision, SHELL has opted to pursue recovery of its contract obligations to MARINE in another way, by using the contract between MARINE and FRANK'S.

To allow SHELL to recover through MARINE is contrary to the mandates of *Campbell II*[106] where the Fifth Circuit prohibited FRANK'S from recovering contribution from UTP toward FRANK'S contractual obligations to Sonat, even though UTP owed a similar contractual obligation to Sonat. There the Fifth Circuit distinguished *Hobbs*,[107] wherein the two indemnitors shared equally in the indemnity obligation to their mutual indemnitee, by refusing to allow FRANK'S to escape its contractual obligation to defend and indemnify Sonat simply because UTP had a similar obligation.[108]

In the instant litigation, if the insurance obligation pursued by SHELL in the name of MARINE is enforceable, which is at all times denied, the situation would clearly be one of *Campbell II*, as neither the contract between SHELL and MARINE nor the contract between SHELL and FRANK'S requires that the indemnitor provide defense, indemnity or insurance coverage to contractors or subcontractors of the indemnitee.[109] Clearly, there is no basis for allowing SHELL to recover its independent contractual obligations to MARINE against FRANK'S and to the extent they wish to do so, their efforts fly in the face of *Campbell II*. Where SHELL seeks to shirk its contractual obligations to MARINE off on FRANK'S, they should be no more successful

---

[106]*Campbell v. Sonat Offshore Drilling, Inc., 27 F.3d 185, 187-188 (5th Cir. 1994).*

[107]*Hobbs v. Teledyne Movible Offshore, Inc., 632 F.2d 1238 (5th Cir. 1980), aff'd without opinion, 636 F.2d 314, 315 (5th Cir. 1981).*

[108]*Campbell, 27 F.3d at 187.*

[109]As a result, should SHELL succeed in this litigation, FRANK'S will file suit against SHELL for contribution. The best end result SHELL could hope to obtain under those circumstances would be a 50% contribution from FRANK'S toward its own independent contractual obligation to MARINE.

than was FRANK'S in *Campbell II* in this pursuit.[110] The MSA between MARINE and FRANK'S clearly was not intended to and does not extend to benefit SHELL. SHELL, hiding behind the identity of MARINE, thereby should not be allowed to shirk its own contractually assumed obligations to MARINE by putting them off on FRANK'S.

CONCLUSION

If the Fifth Circuit's decision is allowed to stand, in exchange for no consideration from MARINE, FRANK'S will bear the full burden of providing LHWCA benefits to Mr. LeBlanc, the entire cost of obtaining comprehensive general liability insurance coverage, including the entire cost of additionally insuring the tort liability of MARINE's own fault and, should coverage exist, will experience the very real effect of taking well over a $500,000 hit on their loss record which will increase FRANK'S insurance premiums for many years to come. As a result, *Ryan* is once again alive and well and the efforts of Congress to end double exposure to LHWCA employers have been rendered meaningless. The employer's statutory grant of limited immunity is now again but a hollow promise. Furthermore, rather than the vessel owner receiving the intended benefits of §905(b), elimination of exposure for unseaworthiness, the vessel owner would receive complete immunity for all of its own acts of negligence, acts over which the longshore employer has no influence or control. As a result, what was intended to benefit both vessel owners and LHWCA employers, under this decision, now benefits, well beyond its intended effect, only vessel owners.

When Congress enacted §905(b), its intent was to alleviate an LHWCA employer's double burden in the form of both worker's compensation benefits and indirect tort liability, i.e., the *Ryan* problem. The Fifth Circuit, first in *Voisin* and now

[110]See also, *Lirette v. Popich Bros. Water Transport, Inc.*, *699 F.2d 725 (5th Cir. 1983)*.

in *LeBlanc*, has chipped away at the protection Congress granted LHWCA employers, so that it has now rendered §905(b) totally ineffective. The *Voisin* exception has gutted the §905(b) rule of prohibition. An LHWCA employer can be forced to provide additional insurance to a vessel owner thanks to the *Voisin* decision because the Fifth Circuit has indicated that an additional assured coverage obligation is not indirect liability (one wonders what, under the Fifth Circuit's interpretation ever would be). Now, thanks to *LeBlanc*, even in a situation where the LHWCA employer has no ongoing business relationship with the vessel owner and has never been paid anything by them, the LHWCA employer can nevertheless be forced to provide the vessel owner additional assured coverage, based on a contract, solely at its own expense.

The United States Supreme Court has not addressed whether the prohibition of §905(b) extends to additional assured coverage obligations and whether those obligations can stand where there is no consideration through direct payment, any ongoing relationship between the parties or even a valid reciprocal indemnity obligation, much less where the contract was obtained by a vessel in a superior bargaining position. FRANK'S submits that this is an important question of federal law that has not been but should be settled by the United States Supreme Court, thus warranting the granting of FRANK'S Petition for Writ of Certiorari.

The Court should grant *certiorari* to review this important matter and reverse the decision of the United States Court of Appeals for the Fifth Circuit. The Petitioner, FRANK'S, asks that this Honorable Court clarify that the purpose behind the enactment of 33 U.S.C. 905(b) was to eliminate the double burden placed upon LHWCA employers in the form of LHWCA compensation benefits and tort liability, whether direct or indirect in the form of contractually required indemnity **or insurance**. Any other decision is contrary to the policies underlying the enactment of 33 U.S.C. 905(b).

Respectfully submitted,
PREIS, KRAFT & ROY
(A Professional Law Corporation)
BY: _____
JENNIFER E. BEYER (10803)
102 Versailles Blvd., Suite 400
Lafayette, Louisiana 70509
Telephone: (318) 237-6062
ATTORNEY FOR FRANK'S CASING
CREW & RENTAL TOOLS, INC.

(Any footnotes trail end of each document)

No. 98-30169

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MURPHY LeBLANC,
Plaintiff,

MARINE DRILLING MANAGEMENT CO.,
Third-Party Plaintiff-Appellant,

versus

GLOBAL MARINE DRILLING CO.,
Defendant,

FRANK'S CASING CREW & RENTAL TOOLS, INC.,
Third-Party Defendant-Appellee.

October 22, 1999, Decided

This litigation involves a contractual dispute which requires a determination whether Marine Drilling Management Co. is entitled to assured status under its contract with Frank's Casing Crew & Rentals Tools, Inc. For the reasons assigned we conclude and hold in the affirmative.

BACKGROUND

Marine entered into a contract with Shell Offshore, Inc. requiring Marine to perform certain drilling services. In turn,

Shell contracted with Frank's for the performance of casing operations in connection with Shell's contract with Marine. Marine, as contractor, and Frank's, as subcontractor, executed a master service agreement (MSA) which covered the drilling/casing work. Paragraph 7.2 of the MSA obligated Frank's to indemnify Marine, and paragraph 6.3 required Frank's to list Marine as an additional assured in its insurance policies. Paragraph 7.1 limited these obligations to injuries "arising out of the performance of [the MSA]."

Murphy LeBlanc, a Frank's employee, [**2] was injured while performing work for Shell on a rig owned by Marine. LeBlanc sued Marine which filed a third-party complaint against Frank's, seeking assured status under paragraph 6.3 of the MSA.

The trial court granted summary judgment to Frank's, holding that the assured clause was not triggered by the injury, reasoning that LeBlanc's injury arose out of the contract between Shell and Frank's, and not out of the MSA. This appeal followed.

ANALYSIS

Summary judgment is appropriate if the evidence establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] We review a summary judgment ruling de novo, applying the same criteria employed by the trial court. [2]

This appeal involves a contractual interpretation. The trial court found the MSA inapplicable. We do not agree. The pertinent provision of the MSA prescribes:

> With respect to work or service performed by Subcontractor [Frank's] pursuant to contracts or work orders with other parties as aforesaid on or for any drilling barges, vessels, platforms, installations or other property of any kind owned by, leased to, chartered to, under the control of, or upon which Contractor [Marine] may be performing services or operations, paragraphs 6 [under which Frank's must list Marine as an assured in certain insurance policies], 7, 8, 9, 10, 12 and 16 shall be applicable as between Contractor and Subcontractor.[3]

We view this language as reflecting a clear contemplation that Frank's would work for a third party on a rig owned by Marine, and that paragraph 6 -- which contains the clause regarding assured status -- would apply in such a situation. Paragraph 7.1, limiting liability to injuries "arising out of the performance of [the MSA]," is not to the contrary.

Frank's advances an alternative basis for the trial court's holding. Relying on a provision in the Longshore and Harbor Workers' Compensation Act,[4] Frank's contends that the agreement with respect to assured status is invalid because it is tied to the statutorily-barred agreement to indemnify.

The specific statutory section upon which Frank's relies, *33 U.S.C. § 905*(b), provides that an employer shall not be liable for any injury to a covered employee caused by the negligence of a vessel, and that any agreement "to the contrary shall be void." In Voisin v. O.D.E.C.O. Drilling Co.,[5] under virtually identical circumstances as the case at bar, we held that § 905(b) does not invalidate an agreement requiring an employer to list a vessel owner as an additional

assured. We concluded that "neither the [LHWCA] nor its legislative history suggests that additional assured clauses such as the one before us are a proscribed form of indirect liability."[6] Although we affirmed the trial court's invalidation of the indemnity clause, we reversed its determination that the assured clause similarly was void.

Frank's seeks to distinguish the case before us from Voisin, suggesting that, unlike the contract in Voisin, the MSA conditions the enforceability of the assured clause upon the enforceability of the indemnity clause. Frank's focuses upon the following language:

> To the extent Subcontractor [Frank's] assumes liability hereunder, and agrees to indemnify Contractor [Marine], Contractor shall be named an additional insured in [certain] insurance policies.[7]

The emphasized phrasing, Frank's insists, specifically makes contingent the validity of the assured clause upon that of the indemnity clause. Continuing, Frank's maintains that if the indemnity clause is invalid the assured clause also must fall.[8]

We are not persuaded that any provision in the MSA, or any language excerpted above, intends such a result. The contractual interpretation advanced by Frank's would have significant force if the MSA required a valid indemnity agreement as a precondition to one obtaining assured status. Such is not the situation before us. The MSA merely states that as Frank's agrees to indemnify Marine, it concomitantly agrees to list it as an additional assured on its policies. Consequently, we conclude that Frank's obligation to list

Marine as an additional assured automatically arose upon its agreement to indemnify Marine in paragraph 7.2. The language of indemnification defines the parameters of the agreement regarding assured status. If the parties had determined to condition Marine's assured status upon the legal enforceability of the indemnity agreement, they very easily could have done so. Under the contractual language as agreed to, however, the MSA may not reasonably be construed as Franks's proposes.

Frank's next maintains that the MSA must fail for lack of consideration. Once again, the teachings of Voisin guide our resolution. We therein dismissed this contention in a footnote:

> In regard to the general validity of the agreement, Rig Hammers [the empioyer] suggests that the [Contract] is void for lack of consideration. . . . However, "the economic burden of the premiums can be allocated as the parties wish." The record reflects that Odeco [the vessel owner] and Rig Hammers had an ongoing business relationship. On some occasions, Rig Hammers would be performing its services for Odeco; in other cases, Rig Hammers would be on board the Odeco vessel, but working under [*876] contract for a third party. . . . In either situation, the [Contract] was the operative agreement establishing the rights and liabilities of the parties. In all likelihood. the cost of Rig Hammers' services was effected by its contractual obligation to name Odeco as an

> additional assured on its liability insurance policies. Under these circumstances, we cannot accept Rig Hammers' contention that the agreement was not supported by sufficient consideration.[9]

Frank's seeks to neuter this effective holding by pointing to purported factual differences between Rig Hammers' relationship with Odeco and its relationship with Marine. A close reading reflects, however, that the facts upon which Frank's heavily relies were of little relevance to the rationale of the Voisin court and likewise have little relevance in today's resolution. The factors significant to the Voisin decision are those identified by the court. Those factors are present in the instant action. The record compels a rejection of Frank's claim that the MSA fails for want of consideration.

Finally, Frank's claims in this litigation that Shell is the real party in interest because it has assumed Marine's defense and has agreed to indemnify Marine under their contract. Based on this, Frank's insists that Shell is seeking contractual benefits from it and attempting to recover for Shell's own contractual obligations to Marine. Neither result, Frank's contends, is permissible under the MSA. We are not persuaded. Shell is not a party to this action and its purported backstage maneuvering is wholly inapposite to the focused issue of contractual interpretation we face. The agreement between Shell and Marine is not in the record before us. The cases cited by Frank's in support of this contention bespeak their own inapplicability; none addresses the factual situation at bar.[10] The burden to be borne by Shell, if any, is not an issue that can be resolved on this appeal.

The summary judgment appealed is VACATED and the matter is REMANDED for further proceedings not inconsistent herewith.

----------Footnotes----------

[1] Fed. R. Civ. P. 56(c).

[2] *Conkling v. Turner, 18 F.3d 1285 (5th Cir.1994).*

[3] Paragraph 1.2.

[4] *33 U.S.C. § 901* et seq.

[5] *744 F.2d 1174 (5th Cir. 1984).*

[6] *Id. at 1177.*

[7] Paragraph 6.3 (emphasis added). [**6]

[8] Marine now concedes that the indemnity clause is invalid.

[9] *Voisin, 744 F.2d at 1177-78 n.2* (citations omitted).

[10] Frank's cites *Foreman v. Exxon Corp., 770 F.2d 490 (5th Cir. 1985); Corbitt v. Diamond M. Drilling Co., 654 F.2d 329 (5th Cir. 1981); Campbell v. Sonat Offshore Drilling, Inc., 27 F.3d 185 (5th Cir. 1994);* and *Hobbs v. Teledyne Movible Offshore, Inc., 632 F.2d 1238 (5th Cir. Unit A 1980).*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUSIANA
LAFAYETTE/OPELOUSAS DIVISION

MURPHY LeBLANC,

versus

GLOBAL MARINE DRILLING

FILED 9/22/97

CIVIL ACTION NO. 95-2042

JUDGE DOHERTY

MAGISTRATE JUDGE TYNES

MAGISTRATE RULING

This matter is before the Court on a Motion for Summary Judgment filed on behalf of Frank's Casing Craw & Rental Tools, Inc. ("Frank's") seeking to dismiss the third party claims made on behalf of Marina Drilling Management Co. ("Marine") for contractual defense, indemnity and coverage as an additional assured on P&I and CGL policies issued, to Frank's by its underwriters for all claims made against Marine by plaintiff Murphy LeBlanc.

Marine in is opposition to the Motion for Summary Judgment of Frank's states that it does not oppose Frank's motion to dismiss Marine's third party claim for defense or indemnity. Therefore, Frank's Motion for Summary Judgment to dismiss Marine's third party claim for defense

and, indemnity is hereby GRANTED. Marine, however, does contest Frank's assertion that the nullification of Frank's obligation to defend and indemnify

Marine also negates Frank's contractual obligation under the Master Service Agreement between Frank's and Marine to name Marine as an additional assured on the CGL and P&I policies issued to Franks. Marine asserts that a 'valid additional assured clause is not prohibited under § 9O5 (b) citing Voisin v. O.D.E.C.O. Drilling, 744 F.2d 1174 (5th Cir. 1984), cert. denied, 105 S. Ct. 1757, 470 U.S. 1053 (1985).

Procedural History

Plaintiff, Murphy LeBlanc, employed by Frank's as a caser, was injured while working for Shell aboard the MARINE 200, a jack-up rig owned by Marine. Subsequently, LeBlanc filed suit against Marine for damages arising from the injury he sustained under 33 U.S.C. 905 et seq. Marine made demand on Shell for contractual defense pursuant to the Master Service Agreement between Shell and Marine's predecessor, Keyes Offshore, Ltd., III. Shell has assumed the defense of Marine.

Law and Argument

In support of the Motion for Summary Judgment, the parties have submitted the Master Service Agreement executed between Marine and Frank's. This Court finds instructive the following provision.

7.0 Indemnity

> 7.1 In order to allocate respective responsibilities of Contractor and Subcontractor for liabilities arising out of personal injury or property damage, it is agreed between Contractor (Marine) and Subcontractor (Frank's) that certain responsibilities and liabilities for personal injuries and property damage arising out of the performance of this Contract should be allocated between them in order to avoid protracted litigation between Contractor and Subcontractor along with the associated legal expenses and so that insurance or self insurance may be arranged by each party as necessary to protect them against these exposures to law. (emphasis added)

The Master Service Agreement reflects mutual provisions for indemnity between the Contractor, Marine, and the Subcontractor, Frank's However, based on the claim asserted by Murphy LeBlanc, this Court finds that Frank's did not have the contractual duty to place Marine on its P&I and CGL policies for purposes of this litigation. LeBlanc's personal injuries are not ones out of the performance of this Contract," i.e., the Master Service Agreement between Marine and Frank's. LeBlanc was on the MARINE 200 at thr behest or Shell and was performing work for Shell. Thus, the work performed by LeBlanc at the time of his alleged accident was not being done pursuant to the Master Service Agreement between Frank's and Marine, and as such, does not "arise out of the Contract' or Master Service Agreement. Accordingly, Frank's had no contractual duty to name Marine as an additional insured under its P&I and CGL policies with

regard to any claims made by Murphy LeBlanc in this litigation.

Accordingly, considering the foregoing Memorandum Ruling, the Motion for Summary Judgment filed on behalf of Frank's Casing is hereby GRANTED as to the duty to name Marine as an additional assured under the Master Service Agreement.

Lafayette, Louisiana this 22 day Sept 1997.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUSIANA
LAFAYETTE/OPELOUSAS DIVISION

MURPHY LeBLANC,

versus

GLOBAL MARINE DRILLING

FILED 9/22/97

CIVIL ACTION NO. 95-2042

JUDGE DOHERTY

MAGISTRATE JUDGE TYNES

ORDER

Considering the foregoing Memorandum Ruling;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed on behalf of Frank's Casing is GRANTED.

Lafayette, Louisiana this 22 day Sept 1997.

UNITED STATES DISTRICT JUDGE

No. 98-30169

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MURPHY LeBLANC,
Plaintiff,

MARINE DRILLING MANAGEMENT CO.,
Third-Party Plaintiff-Appellant,

versus

GLOBAL MARINE DRILLING CO.,
Defendant,

FRANK'S CASING CREW & RENTAL TOOLS, INC.,
Third-Party Defendant-Appellee.

November 24, 1999, Filed

JUDGES:

Before REYNALDO G. GARZA, POLITZ, and BARKSDALE, Circuit Judges.

OPINIONBY:

Henry A. Politz

OPINION:

ON PETITION FOR REHEARING AND REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) The Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

Henry A. Politz

United States Circuit Judge